

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

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Concord, New Hampshire

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RE: **DT 08-130 METROCAST CABLEVISION OF N.H.:**
Request of Union Telephone to Rescind
Metrocast CLEC Authorization.
DT 09-065 IDT AMERICA CORP.:
Request of Union Telephone to Rescind
IDT America Corp. CLEC Authorization:
(Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Clifton C. Below
Commissioner Amy L. Ignatius

Sandy Deno, Clerk

APPEARANCES: **Reptg. Union Telephone Company:**
Paul J. Phillips, Esq. (Primmer, Piper...)
Cassandra C. LaRae-Perez, Esq. (Primmer...)

Reptg. Metrocast Cablevision of N.H., LLC:
Robert J. Munnelly, Esq. (Murtha Cullina)

Reptg. IDT America Corp.:
Carl W. Billek, Esq.

Reptg. Granite State Telephone, Inc., et al:
Frederick J. Coolbroth, Esq. (Devine...)

Reptg. segTEL, Inc.:
Jeremy Katz
Kath Mullholand

Reptg. PUC Staff:
Matthew J. Fossum, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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1 P R O C E E D I N G

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the prehearing conference in Dockets
4 DT 08-130 and DT 09-065. On May 20, 2010, the New
5 Hampshire Supreme Court issued its opinion in Appeal of
6 Union Telephone Company, holding that RSA 374:22-g and
7 374:26 require a notice and hearing before granting a
8 competitive local exchange carrier, such as Metrocast, a
9 franchise to provide telephone services. The Court
10 remanded to the Commission the question of whether federal
11 law preempts such a state notice and hearing requirement,
12 observing that resolving the preemption question may
13 entail additional fact finding. We issued an order on
14 June 11 setting the prehearing conference for this
15 morning.

16 Can we take appearances.

17 MR. PHILLIPS: Good morning, Chairman
18 Getz and Commissioners Below and Ignatius. I'm Paul
19 Phillips, from the law firm of Primmer, Piper, Eggleston &
20 Cramer, in Montpelier, Vermont. I am here representing
21 Union Telephone Company. I'm joined by Cassandra
22 LaRae-Perez from our firm, as well as by Tom Murray, who
23 is the Manager of External Relations for TDS Telecom.
24 Union Telephone is an affiliate of TDS Telecom as of last
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1 December.

2 CHAIRMAN GETZ: Good morning.

3 MR. MUNNELLY: Good morning,
4 Commissioners, Mr. Chairman. Robert Munnelly, of Murtha
5 Cullina, here for Metrocast. With me, at the end of the
6 table, is Josh Barstow, who is the Vice President of
7 Advance Services for Metrocast.

8 CHAIRMAN GETZ: Good morning.

9 MR. BILLEK: Good morning. I'm Carl
10 Billek representing IDT America. And, I have with me Tom
11 Jordan, also of IDT America.

12 CHAIRMAN GETZ: Good morning.

13 MR. COOLBROTH: Good morning, Mr.
14 Chairman, Commissioners. On behalf of Granite State
15 Telephone, Inc., Dunbarton Telephone Company, Bretton
16 Woods Telephone Company, Inc., and Dixville Telephone
17 Company, I'm Frederick Coolbroth, of the firm of Devine,
18 Millimet & Branch. With me at counsel table are William
19 Stafford of Granite State Telephone and Stephen Nelson of
20 the Dunbarton Telephone Company.

21 I would point out that we had intervened
22 before also on behalf of four of the TDS Companies,
23 namely, Merrimack County Telephone Company, Kearsarge
24 Telephone Company, Wilton Telephone Company, Inc., and
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1 Hollis Telephone Company, Inc. Those companies are now
2 affiliates of the Petitioner and are not proposing to
3 participate any further with our group of rural telephone
4 companies. Also, Northland Telephone Company of Maine,
5 Inc., an affiliate of FairPoint, is not participating
6 further. So, I'm representing the four companies. Thank
7 you.

8 CHAIRMAN GETZ: Thank you.

9 MR. KATZ: Good morning. Jeremy Katz,
10 representing segTEL. And, we filed a Motion to Intervene
11 this morning, and I have a hard copy with me to provide as
12 well.

13 CHAIRMAN GETZ: Okay. I don't believe
14 that we have seen that. If you could provide copies?

15 (Mr. Katz distributing documents.)

16 MR. FOSSUM: And, good morning. Matthew
17 Fossum, from the Staff of the Commission. And, with me
18 this morning are Kate Bailey, Michael Ladam, and Jennifer
19 Ducharme from Commission Staff.

20 CHAIRMAN GETZ: Okay. Good morning.
21 Mr. Phillips.

22 MR. PHILLIPS: Thank you, Mr. Chairman.
23 I'd like to first deal with the segTEL Petition to
24 Intervene, which we were served by hand this morning. I
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1 have had discussions with Mr. Katz and with
2 Ms. Mullholand, and our understanding is that segTEL is
3 intervening on the narrow issue of the federal preemption
4 question that was raised by the New Hampshire Supreme
5 Court decision, and not on any substantive issues that may
6 arise in the case involving Union Telephone, IDT, and
7 Metrocast.

8 And, so, I would ask Mr. Katz if I have
9 accurately characterized the narrow nature of his
10 petition, and then I will provide Union's response to
11 that?

12 CHAIRMAN GETZ: Mr. Katz.

13 MR. KATZ: That's accurate.

14 MR. PHILLIPS: On that basis, Union does
15 not object to the intervention petition.

16 CHAIRMAN GETZ: Okay. Thank you.

17 MR. PHILLIPS: We're here this morning
18 because this Commission, in 2009, issued two CLEC
19 authorization orders in DT 08-130 and DT 09-065 without
20 first conducting a hearing as required by statute. The
21 Commission denied Union Telephone's motions to rescind
22 those authorizations and to hold hearings in these cases
23 before ruling on the Applicants' request for CLEC
24 authorization.

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1 The New Hampshire Supreme Court has now
2 vindicated Union Telephone's right to a hearing and has
3 reversed the PUC's orders denying Union's motions. The
4 Court has remanded the cases to the PUC for the purposes
5 of determining whether the hearing requirement in New
6 Hampshire law is preempted by federal law, and, if not, of
7 holding the hearing required by New Hampshire law.

8 As we will discuss further, it is
9 Union's position that the hearing requirement of RSA
10 374:26, when applied to CLEC applications filed under RSA
11 374:22-g, does not pose a barrier to entry that is
12 preempted by federal law. A hearing to consider a CLEC
13 application to serve in a rural service area in New
14 Hampshire allows this Commission to exercise its proper
15 oversight function under the factors listed in 374:22-g.
16 Indeed, it is our position that the present applications
17 present an excellent case for the need for that oversight
18 hearing.

19 The Supreme Court's reversal order of
20 May 20th demonstrates the harm that Union Telephone has
21 experienced as a result of the violation of its due
22 process hearing rights, and creates a need for this
23 Commission to grant relief to address that harm. And,
24 I'll discuss those points further.

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1 Just as preliminary matters, as I noted,
2 Union Telephone has undergone a change in ownership as of
3 last December, and is now an affiliate of TDS Telecom.
4 That acquisition does not impact Union's legal positions
5 in these cases, although there has been, obviously, a
6 change in legal representation.

7 I want to note that Union received a
8 copy of the joint statement of -- the "Joint Statement and
9 Proposed Findings of Fact and Law" that was filed
10 yesterday by e-mail by IDT and Metrocast. The document
11 states that it's being filed by overnight mail, and so I
12 assume it was received by the Commission today.

13 CHAIRMAN GETZ: We have not seen it.

14 MR. PHILLIPS: While I've quickly
15 reviewed it, I have not had an opportunity to confer in
16 particular on the details with my client. So, we reserve
17 our right to respond in writing to it. Our initial
18 reaction is that the adoption of these proposed findings
19 would compound, rather than cure, the error that the
20 Supreme Court found. And, so, I may have some additional
21 comments about that as I proceed.

22 CHAIRMAN GETZ: I'm sorry, that was
23 filed by, say that again?

24 MR. PHILLIPS: It was filed jointly.

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1 Well, it was filed by Mr. Munnelly jointly on behalf of
2 IDT America and Metrocast. It was dated yesterday. And,
3 it says "Via e-filing and overnight mail".

4 The Commission's task in these two cases
5 is made more difficult by the fact that the Commission has
6 taken subsequent action based on the two authorization
7 orders, including actions that affect both the substantive
8 and procedural due process rights of Union Telephone.
9 Specifically, in DT 09-048, the PUC arbitrated an
10 interconnection dispute between IDT and Union Telephone.
11 Overruling Union's numerous objections or denying Union's
12 numerous motions to dismiss, based on IDT's improper CLEC
13 authorization in New Hampshire, the PUC established the
14 terms of an interconnection agreement between IDT and
15 Union, and the parties filed an interconnection agreement
16 in compliance with the PUC's order. That interconnection
17 agreement took effect on December 18th, 2009.

18 We recognize that the recommendations in
19 the -- of the Hearing Examiner and the Arbitrator in that
20 case, and the Commission's ruling on those recommendations
21 determined that IDT and Metrocast were entitled to request
22 interconnection without first receiving their
23 authorizations to serve in Union's service area. And, so,
24 we're not challenging the interconnection agreement.

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1 However, what is clear from the
2 recommendations and rulings in that case, and from IDT's
3 arguments in that case, is that a good deal of the legal
4 analysis relied on the two CLEC authorization orders in DT
5 08-130 and 09-065. We can't say today whether the
6 Commission and its Hearing Examiner and Arbitrator would
7 not have reached the same conclusions without the two CLEC
8 authorization orders. But what we can say is that the two
9 orders rested on a deprivation of Union's right to due
10 process.

11 For example, in the arbitration case,
12 Union argued, based on a decision by the Maine PUC in the
13 CRC case, that a rural telephone company Section 251(f)
14 exemption bars a CLEC from seeking arbitration even under
15 a Section 251(a) and (b) interconnection agreement,
16 because the obligation to negotiate in good faith derives
17 from Section 251(c), from which the rural company is
18 exempt. And, so, in the Maine Commission's words, "until
19 and unless the rural exemption is lifted, there is quite
20 simply nothing to arbitrate."

21 In the arbitration case here, IDT argued
22 that Union was precluded from relying on the Maine PUC
23 case, because the PUC in New Hampshire had already
24 resolved the interplay of Sections 251(a) and (b) with the
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1 exemption in 251(f) in the earlier CLEC authorization
2 orders. And, I have the Arbitrator's decision in that
3 case. And, I have flagged the approximately eight to ten
4 instances in which the Arbitrator specifically references
5 the CLEC authorization orders in discussing the rural
6 exemption interplay with 251(a) and (b).

7 So, as we now know from the New
8 Hampshire Supreme Court, the CLEC authorization orders
9 were granted in violation of Union's due process rights.
10 And, so, the PUC's decisions in these authorization orders
11 should not have limited Union's ability to press for
12 adoption of the Maine PUC's analysis during that
13 arbitration proceeding. I raise this point just to make
14 the point that the New Hampshire Supreme Court's reversal
15 has a wider impact than just the two CLEC authorization
16 proceedings at issue here.

17 Turning to the issues presented by the
18 Court on remand, Union asserts that the statutory
19 requirement of a hearing is not preempted by federal law
20 when applied to CLECs. The New Hampshire hearing
21 requirement applies to all new utility service providers,
22 without discrimination, and is therefore competitively
23 neutral, in accordance with the requirements of Section
24 253(b). In fact, the Supreme Court made clear that the
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1 hearing requirement in 374:26 was intended to apply to all
2 utilities without exception. And, the problem that they
3 had with the PUC's order was that you had created an
4 exception for CLECs in a manner that violated the
5 neutrality of that statute.

6 I will also note that the Applicants, in
7 their proposed findings of fact, which I know you have not
8 reviewed yet, suggest that "a rural ILEC is free to offer
9 any service within its region but that a potential entrant
10 is subject to the statutory hurdle of a hearing under
11 374:22 and 374:26." The Applicants failed to acknowledge
12 that rural ILECs went through similar procedural hurdles
13 before they were authorized to serve, and face substantial
14 regulatory scrutiny and review when they want to provide
15 services or change rates. It's not accurate to say that
16 "a rural ILEC is free to serve" -- or, "free to offer any
17 service in their territory".

18 And, the mere fact that every provider
19 seeking new authority to serve faces a hearing requirement
20 does not render the hearing requirement anti-competitive
21 or make it an unlawful barrier. The requirement is
22 intended only, and I'm quoting here from 253(b), "to
23 preserve and advance universal service, protect public
24 safety and welfare, ensure the continued quality of
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1 telecommunications services, and safeguard the rights of
2 consumers", all of which are permitted by federal law.

3 In fact, the hearing requirement in New
4 Hampshire is much less burdensome than the authority
5 granted to states under Section 253, which expressly
6 authorizes a state commission "to require a
7 telecommunications carrier that seeks to provide telephone
8 exchange service or exchange access in a service area
9 served by a rural telephone company to meet the
10 requirements in Section 214(e)(1) of this title for
11 designation as an eligible telecommunications carrier for
12 that area before being permitted to provide such [a]
13 service." And, I'm quoting from 47 U.S.C. 253(f).

14 So, it really strains credulity to
15 suggest that a hearing requirement is a barrier to entry
16 that is greater than the imposition of ETC requirements
17 would be, and yet the statute -- the federal statute
18 expressly authorizes this Commission, in its discretion,
19 to impose ETC requirements.

20 So, our reaction to the proposed
21 findings that IDT filed today is that the Applicants
22 appear to believe that, not only does state statutory
23 requirement for a hearing, but the requirements of federal
24 law in 253(f), namely, the termination of the rural

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1 exemption requirements, are themselves all barriers to
2 entry. That the Applicants have argued in this pleading
3 today that any requirements, even those in the federal
4 law, are barriers to entry.

5 We find that they have made simply a
6 series of conclusory statements to the effect that all
7 existing state and federal statutory requirements for
8 serving in rural areas will "impede and adversely affect"
9 telephone competition in those areas. Their position
10 appears to be that this Commission should exercise no
11 scrutiny of CLEC applications at all.

12 Union believes that the statutory
13 requirement to hold a hearing allows the Commission to
14 exercise the proper level of scrutiny over those seeking
15 to serve as a telecommunications utility. If a carrier
16 that was already authorized to serve in the non-rural
17 areas in New Hampshire had failed to pay for services that
18 it used, for example, or had demonstrated a disregard for
19 the Commission's rules or orders in previous cases, or in
20 proceedings before other state utility commissions or
21 other states' courts, the Commission would certainly want
22 to scrutinize that carrier if it applied to serve in the
23 rural areas in New Hampshire. Merely invoking the
24 benefits of competition is not enough for a carrier to

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1 evade the Commission's scrutiny. And, that is precisely
2 why the General Court provided for a hearing requirement
3 for applications to offer telephone service.

4 I raise that example, because I think
5 it's an example that's familiar to the Commission. And, I
6 will say that I'm referring in that instance to Global
7 NAPs, which was present before the Commission yesterday,
8 and is authorized to serve in non-rural areas, but not in
9 -- not in rural territories. And, the notion that a
10 Global NAPs, in applying for CLEC status in rural
11 territories, would not face any scrutiny from this
12 Commission is very troubling to us. And, I don't raise
13 that example lightly. We heard yesterday, in sworn
14 deposition testimony following the prehearing conference,
15 that IDT is the fourth largest customer of Global NAPs.
16 And, this correspondent to discovery responses, which were
17 confidential, that we received from Global NAPs in the
18 proceedings in DT 08-028, in which this Commission has
19 authorized the TDS Companies to block Global NAPs's
20 traffic, it is very concerning to us that a carrier that
21 has a relationship with Global NAPs of that magnitude
22 would not face any scrutiny from this Commission. And,
23 I'm not suggesting, you know, anything about how the
24 Commission should resolve that matter. But I am
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1 suggesting that that factual circumstance presents to us a
2 very strong need to have a hearing, which is what the
3 statute requires.

4 The Applicants' proposed findings of
5 fact complained that, if the statutory hearing requirement
6 is enforced, they "will have no assurance that their
7 applications will be granted by the Commission, following
8 the required notice and hearing processes under RSA
9 374:22-g and 374:26." I can think of no other applicant
10 that comes before the Public Utilities Commission with an
11 expectation or an entitlement that their application will
12 be granted. The suggestion here is that the Commission
13 lacks authority to exercise any regulatory scrutiny that
14 would any way result in a denial of the applicant's
15 request. The Commission is here to protect the public
16 good, not to guarantee that an applicant will prevail in
17 its petition for authority to serve, and that is what the
18 statutory hearing requirement is all about.

19 Getting to the substance of the hearing
20 requirement, we believe that RSA 374:22-g, II, governs the
21 scope of the public good hearing. That statute enumerates
22 seven separate factors that need to be addressed. Factual
23 findings on these factors should rest on evidence and not
24 presumption. We were troubled in the initial Commission

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1 orders that denied Union Telephone's motions, that there
2 appeared to be a presumption of certain facts, rather than
3 an evidentiary basis for those facts. And, I'm speaking
4 specifically of the reference in the Commission's orders
5 to the amount of high cost universal service funding that
6 Union Telephone received in 2007, and the suggestion that
7 that compensation in some way would fully compensate Union
8 for the effects of competition in its area. Our concern
9 with that is that there was no evidence, there was no
10 hearing conducted, nor was there evidence taken on that
11 issue. We would expect in a hearing that we would be able
12 to refute that presumption, assuming that presumption
13 arose.

14 We also note that, in the arbitration
15 proceeding, the Arbitrator discussed the "novel business
16 arrangement" that IDT and Metrocast present in the
17 arbitration proceeding, and that they also presented in
18 the initial application for authority to serve.
19 Obviously, we did not have the opportunity at a hearing on
20 those applications to explore further what that novel
21 business arrangement is. We didn't get a chance to take
22 that up until the arbitration proceedings. Which, as I
23 said earlier, relied in large measure on the authorization
24 orders.

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1 So, these are some of the issues that we
2 believe we would need to explore in an evidentiary
3 hearing. There are also other issues, but I wanted to
4 give you a flavor of what we believe the substantive
5 issues would be, if we get to the point of a hearing on
6 the merits of this application.

7 Union attempted multiple times, by my
8 count 12 separate times, both in the -- in the
9 authorization dockets, as well as in the arbitration
10 proceeding, to get the Commission to honor the hearing
11 requirement in the statute. And, in each instance, they
12 were denied. The rippling effects of those denials are
13 with us here today. The arbitration proceeding resulted
14 in an interconnection agreement. That interconnection
15 agreement took effect in the middle of December. Union
16 Telephone began receiving porting requests from IDT
17 starting in January. Since January, for the past six
18 months, approximately 400 Union Telephone numbers have
19 been ported to IDT. In our opinion, respectfully, those
20 numbers were ported to a carrier that does not have a
21 lawful authorization to serve in Union's territory. By
22 our calculation, the amount of revenue lost to Union from
23 those ported numbers is just shy of \$100,000. And,
24 obviously, with each passing day, the number grows higher

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1 and the line loss increases.

2 Consequently, we feel compelled to seek
3 relief from the Commission during the pendency of this
4 proceeding. So, we would ask the Commission to suspend
5 the two CLEC authorization orders and not to allow further
6 deterioration of Union's business from IDT and Metrocast
7 while this proceeding is pending. We would ask for an
8 order that would require IDT and Metrocast to cease
9 marketing their services in Union territory.

10 CHAIRMAN GETZ: What would be the
11 standard that we would apply to make such a judgment? It
12 seems to me it's largely a balancing of the equities, in
13 some respects. I mean, it appears, I guess to both sides
14 of the argument, that one is that the -- at present, at
15 least under state law, that the authorization was
16 unlawfully granted. On the other hand, we have this
17 pending question on remand of whether preemption applies
18 that is undetermined.

19 MR. PHILLIPS: Yes.

20 CHAIRMAN GETZ: And, that a possible
21 result is that it could be -- could have been lawfully
22 granted. So, how do we make a judgment on which way to go
23 on the balancing?

24 MR. PHILLIPS: Well, with respect, Mr.

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1 Chairman, I think you have the final word, at least on
2 state law, from the New Hampshire Supreme Court, which is
3 that there is a hearing requirement under state law. You
4 are asked to examine whether there's a federal preemption
5 question. In terms of the balancing of harms, I explained
6 what the harm is to Union, which is a harm that has
7 occurred as a result of the authorization orders, and it
8 continues to grow every day. I understand, obviously,
9 I'll listen for what IDT says in terms of the harm to
10 them, our view is that we are not seeking to have them,
11 you know, re-port the numbers or turn the customers back
12 or stop providing service to those customers. All we are
13 asking for is that, from this point forward, they stop
14 marketing and stop soliciting and taking new customers.

15 CHAIRMAN GETZ: And, I guess, in
16 addition, that you would be asking for any disgorgement of
17 revenues collected or --

18 MR. PHILLIPS: We're not asking for
19 that, although I would ask for a bond that would protect
20 our interests, in the event that we prevail in this
21 matter. And, so, I've given the figure of \$100,000. I
22 think that is a reasonable amount for a bond requirement.
23 And, the purpose of that bond would be an acknowledgment,
24 first and foremost, that the Company has not been --

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1 CHAIRMAN GETZ: Why would you need a
2 bond, if we granted the relief prospectively that they --
3 and if you're not trying to seek any retroactive relief?

4 MR. PHILLIPS: Well, the bond would be
5 for compensation for the period in which, and, again, this
6 is premised on our prevailing on the merits, for the
7 compensation that we've lost in the time during which the
8 unlawful authorization occurred. So, the bond is simply a
9 reflection of what's happened already. The suspension is
10 to address what we perceive is the harm going forward.

11 CHAIRMAN GETZ: Okay. I thought you
12 were saying you weren't seeking anything for what's
13 occurred to date?

14 MR. PHILLIPS: I'm not seeking any
15 disgorgement in that sense. I'm not asking them to pay
16 us, you know, today. If they prevail in the action, there
17 will not be any need for them to pay, obviously. But I
18 would like some assurance of payment from them in the
19 event that we do prevail.

20 CHAIRMAN GETZ: Okay.

21 MR. PHILLIPS: That's really all that I
22 have. We don't believe that there's a need for
23 preemption. And, we do believe there is a need for a
24 hearing, and we expect that we will be presenting evidence

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1 --

2 CHAIRMAN GETZ: What process, though?

3 Similar to the questions I asked of Mr. Coolbroth --

4 MR. PHILLIPS: Yes.

5 CHAIRMAN GETZ: -- in the 09-198
6 proceeding. Brief the issue of preemption first, then see
7 where we go, in terms of whether a hearing occurs? Do
8 them in parallel? Do -- I mean, what's Union's position?

9 MR. PHILLIPS: Well, what I would
10 recommend in this instance, and I agree with
11 Mr. Coolbroth's position, that the preemption issue really
12 is a legal question, and I think we can deal with that on
13 the briefs. Is that we not consolidate the cases, but
14 that we have a joint briefing period, so that we can all
15 brief the preemption issue. There would not be a formal
16 consolidation. In any event, if the Commission determines
17 that the hearing requirement is not preempted, the
18 statutes would then proceed on their separate tracks -- I
19 mean, sorry, the dockets would then proceed on their
20 separate tracks.

21 CMSR. BELOW: I do have a question. If,
22 assuming the conclusion was that there's not a federal
23 preemption, and so the notion stands that the state law
24 requires a hearing pursuant to RSA 374:26 for proceedings
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1 under RSA 374:22-g, and RSA 374:22-g is not -- I don't
2 believe is really limited to rural local exchange
3 carriers, it's a general provision with regard to any
4 competitive provider for local exchange services or any
5 other telecommunications service in any service territory,
6 then would it be your view that anybody who's already been
7 authorized, we need to revisit them, that authorization,
8 and go through the hearing requirement? Would that be
9 universal to all CLEC authorizations or all that are of
10 concern to your client? We heard in the previous
11 prehearing conference that there may be at least two other
12 companies that have registered as CLECs for statewide
13 authorization, which would include Union's service
14 territory. What about those?

15 MR. PHILLIPS: Well, I would make two
16 points about that. First, the statute has a waiver
17 option, if the parties agree that the hearing may be
18 waived. So, I think that the Commission, if it, you know,
19 is interested in exploring its prior CLEC authorizations,
20 might well find that, in a substantial number of them,
21 there's a waiver of that hearing requirement. Obviously,
22 I can't predict that, but I do note that the statute has
23 that option. I also would point out that the statute
24 talks about a "due hearing", and I think, as I read that

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1 word "due", it means a hearing that is proper to the
2 application that's been made. Our view is that, although
3 there is a hearing requirement, it does not need to be a,
4 you know, highly contested hearing, unless -- unless
5 circumstances warrant it. And, in this particular case,
6 although I want to hear from IDT about this, we believe
7 there are issues that warrant, you know, a fairly rigorous
8 scrutiny from the Commission about the applications. That
9 would not be the case in every application. I think the
10 Commission might well find itself needing to interpret
11 that word "due" as it proceeds.

12 CMSR. BELOW: Okay.

13 CHAIRMAN GETZ: Okay.

14 MR. PHILLIPS: Thank you.

15 CHAIRMAN GETZ: Thank you.

16 Mr. Munnelly. And, also, if you have copies of the -- is
17 it a "Proposed Findings of Fact"?

18 MR. MUNNELLY: Yes, I did. I don't have
19 extra copies of it with me. We did e-mail it to
20 Ms. Howland last night. And, I don't know who else was on
21 the e-mail string for that.

22 CHAIRMAN GETZ: Okay.

23 MR. MUNNELLY: I certainly can get extra
24 copies to the Commission, if they're not --

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1 CHAIRMAN GETZ: Well, we can get them
2 after the hearing, but let's hear you address that and
3 your other issues.

4 MR. MUNNELLY: Okay. Sure. Okay. Just
5 first off, in terms of the case as a whole, again, thank
6 you for having us here this morning. You know, we
7 certainly appreciate the opportunity to talk about what to
8 do on remand from the Court's decision. The court case is
9 clear that the remand is for us to look at the federal
10 preemption issue. And, we certainly agree that, from
11 Metrocast, we agree that that should be addressed first,
12 as a threshold question, before you get into other issues
13 in the docket. We certainly believe that the hearing
14 requirement is an entry barrier and it should be
15 preempted. And, certainly, we would like to have the
16 Commission rule that as promptly as we can get a schedule
17 together to make that happen.

18 We did circulate a draft of -- last
19 night, and I apologize that it didn't get done until the
20 night before the hearing. It did have some proposed
21 factual legal findings. But, to some extent, we wanted to
22 get it to the parties ahead of time so we could discuss
23 them during the technical session, in terms of what's the
24 proper way to proceed, whether it is something that we

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1 should try to make an effort to stipulate some facts, then
2 brief, or do something else. We thought at least getting
3 something done on the record ahead of time might move
4 things forward. And, I apologize again that's -- that we
5 didn't get it until just before the beginning of the
6 hearing, but we did want to at least get it in ahead of
7 time so we could discuss it today.

8 In terms of the -- I think I would like
9 to address a few of the points that were raised by Union
10 today, if I can. The first one is, I think what you're
11 seeing from the presentation that Union made is exactly
12 why this an entry barrier. They have acknowledged that
13 they want to have a hearing, they want the hearing to
14 address -- have evidence that involves all seven of the
15 factors under 22-g. They have raised an issue of they
16 want to look at some of the positions that were addressed
17 during the preceding arbitration case. They've talked
18 about whether they should look into factors that were in
19 separate potential IDT arrangements with another CLEC.
20 They have noted that you should look at the unique
21 business arrangements between IDT and Metrocast, putting
22 aside the fact that the Commission has already ruled on
23 those and accepted those. That's what happens when you
24 get this type of an open-ended notice and hearing process.

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1 And, in which a -- that type of all-encompassing scope of
2 a hearing is going to be an entry barrier to somebody
3 wanting to enter in the rural territories in New Hampshire
4 not that -- that they do not have that many subscribers.
5 It's going to cost a lot of money to go through that type
6 of an all-encompassing CLEC application process. Putting
7 aside the fact that --

8 CHAIRMAN GETZ: But are you saying then,
9 let me make sure I'm following the threads of this
10 argument, --

11 MR. MUNNELLY: Sure.

12 CHAIRMAN GETZ: -- these are reasons
13 that support a preemption finding or, if there is no
14 preemption finding, that we could do something that's less
15 than what's in the statute?

16 MR. MUNNELLY: This is -- it's to your
17 first point. This is something that supports preemption.
18 It's something we seek to point out in the course of this
19 proceeding that suggests why having the notice and hearing
20 requirement does cause a problem here and it should be
21 found to be preempted. So, that's the first part. That's
22 an awful lot of ground that was covered.

23 The second point is that the Union
24 counsel tried to argue that Metrocast and IDT were taking
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1 the position that there was no Commission review. That's
2 certainly not something that we support. The Commission
3 -- we filed our own application under the 431 process.
4 That has a whole bunch of factors that are taken into
5 account. Including, you know, I believe it includes
6 investigations that the applicant is involved in in other
7 states and that type of thing. I mean, certainly, that's
8 -- that can be -- the Commission reviews that, those
9 applications as they go in, and that's certainly
10 appropriate on that.

11 The other part of that is that, again,
12 in a world where you don't have the notice and hearing
13 requirement, and you have an application that's approved,
14 we support what the Commission said in the oral arguments
15 at the Supreme Court. Which is that they will be happy to
16 have those applications be copied on the local LEC. And,
17 so, the local LEC would have the opportunity to, if they
18 needed to, to file a, you know, a pleading with the
19 Commission saying that "in this particular circumstance,
20 they would, you know, it's something that the Commission
21 could consider an investigation." They certainly would
22 have that ability to do that, for an extraordinary case.
23 But, for the most part, there is an application process in
24 place. There's a substantive review that would happen

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1 under that application process. It's not as if the
2 Commission -- is that anyone is saying that there is no
3 Commission review at all.

4 I also want to take issue with Union
5 counsel's statement that "the state review is narrower
6 than the federal review." The federal review is actually
7 quite narrow. It does deal with universal service,
8 consumer protection requirements and that type of thing.
9 It doesn't deal with the state requirement that the
10 evidence be taken on the impact of the incumbent's rate of
11 return. I mean, that's an all-encompassing review to us.
12 That essentially turns the CLEC application process into a
13 rate case or a potential rate case. And, that is a very
14 big deal. And, it's going to, to the extent that that is
15 pushed by the incumbent LEC, that is something we see as a
16 fairly substantial barrier that goes far beyond what
17 Section 253 envisions.

18 And, 253 envisions the role of a
19 Commission as being especially focused on things within
20 its jurisdiction. The consumer protection rules, of
21 course, generally applicable consumer protection rules are
22 certainly within the Commission's province and that type
23 of thing. But, looking at how it affects their internal
24 rate of return is just a nonstarter, from the standpoint
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1 of actually allowing people to get into the State of New
2 Hampshire in the rural territories.

3 In terms of the issue of a stay, we
4 certainly would oppose that. We would certainly, you
5 know, we thought that there was a case below, a strong
6 case below that this was federally preempted, but the
7 Commission rested on the statutory issue. Now that we're
8 back, we certainly don't concede that we had a -- that the
9 original CLEC was -- that the original application -- that
10 the original authorization, you know, lacks support. You
11 know, to the extent that the Commission decides to have a
12 stay, then certainly that would mean that we'd need to
13 decide this case as quickly as we can, so that we aren't
14 allowed to serve new customers and to be impeded with
15 unduly.

16 We certainly oppose the idea of a bond.
17 And, I guess I still can't -- I share I think what the
18 Chairman's concern was, that over exactly what the bond
19 would be for. Union said that they're not seeking
20 disgorgement of earnings that happened already. I guess
21 I'm having trouble seeing what the bond is for on that,
22 and so we'd be concerned about that and would oppose it.

23 And, then, there's the matter of
24 process, in terms of actually what we're going to do to

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1 get this decided. We actually, I think, we're for the
2 most part on board with the idea that this is something
3 which should be briefable or something that can be handled
4 with briefing, possibly with affidavits supporting it. We
5 could try to do the issue of trying to get to, you know,
6 some level of joint stipulation of facts before we
7 proceed, but it may be just as easy to having something
8 that gets briefed with proposed findings of fact or
9 something like that. Because the problem is that, in this
10 type of case, it's hard to really have that many facts
11 that are relevant. You can stipulate to what, you know,
12 what a rural ILEC would be entitled to, and some of that
13 you heard from Mr. Phillips' presentation. They have
14 agreed it should include all seven points of the, you
15 know, in 22-g. They have noted that they want to have a
16 scope that goes beyond that, perhaps to look at other
17 issues that are other related dockets to the parties. You
18 know, again, we can stipulate that that's what the review
19 could have. We certainly can say that it's going to have
20 a public notice. That it's going to have a hearing. That
21 it's going to have opportunities for evidence. You could
22 have opportunities for briefs. So, that we have the scope
23 of what the state proceeding is. That proceeding perhaps
24 can be stipulated to or maybe just the notice can be taken

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1 on that.

2 But, beyond that, the issue really comes
3 down to that we're dealing with every single CLEC
4 application. This is not a one-time deal. This is
5 something that's for every CLEC that enters Union's
6 territory, the issue is "what do they have the right to
7 do, if they choose to do it?" And, that's something that,
8 you know, we can certainly present argument several
9 different ways on that. But it's, for the most part, is
10 saying this is what they may be doing, and, based on that,
11 that's enough of a barrier to entry.

12 That's really all I have, Mr. Chairman.

13 CHAIRMAN GETZ: Thank you. Mr. Billek.

14 MR. BILLEK: IDT is really in agreement
15 with Mr. Munnelly and Metrocast's statement, and I don't
16 want to spend our time restating pretty much everything he
17 just said. There's only one thing I really wanted to
18 touch upon. And, that was TDS's counsel bringing up IDT's
19 commercial relationship with Global NAPs, which I found
20 astoundingly inappropriate, offensively so. IDT is aware
21 that there's been a recent decision out of this Commission
22 regarding Global NAPs' ability to terminate traffic into
23 the state. And, we have abided by that. We do not send
24 Global NAPs traffic to New Hampshire. We do not send

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1 traffic terminating in New Hampshire to Global NAPs.
2 Otherwise, who IDT has commercial relationships with,
3 particularly when those companies are licensed and
4 lawfully permitted to provide service within a particular
5 state, is utterly and completely IDT's right, and is
6 absolutely none of TDS's concern. And, to think that TDS
7 would be raising that, and thinking that it's appropriate
8 to raise that as part of a hearing as to whether IDT has a
9 right to be a CLEC within its territory, I think really
10 only goes to show just what such a hearing might be and
11 why such a hearing would violate 253. And, thank you.

12 CHAIRMAN GETZ: Mr. Coolbroth.

13 MR. COOLBROTH: Thank you, Mr. Chairman.
14 We do not have anything to add to the legal issues raised
15 by Union Telephone Company. I would note that, and I'm
16 not sure I heard it right, to the extent that Union
17 Telephone Company takes the position that RSA 374:22-g,
18 II, applies to companies other than telephone utilities,
19 we take no position on that. We didn't think that was the
20 case.

21 With respect to the point raised by
22 Mr. Munnelly about the existing substantive review that
23 the Commission conducts with respect to CLEC applications,
24 I would just direct the Commission's attention to Rule
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1 431.01 relating to the registration process, which -- and
2 431.02, grounds for denial. Which really are limited to
3 violations, history of violations of the Commission's
4 rules, past criminal conduct. But, even with regard to
5 criminal conduct, it appeared that it has to be conduct
6 that somehow has a -- criminal conduct that has an effect
7 on the telephone business. Looking at the Form CLEC-10,
8 that's simply a series of questions of "are you a
9 criminal?" or "have you violated rules before?" This is
10 not a probing, substantive review. And, so, I would just
11 take exception to that characterization of the existing
12 process.

13 Finally, I, with respect to raising the
14 issue about Global NAPs, I fail to see how that should be
15 offensive. The issue about contributing to the flow of
16 traffic in New Hampshire by a carrier who pays nobody, the
17 idea that an application would facilitate that, I think
18 would probably be of concern to the Commission. And, as a
19 legal point, I certainly don't think it's offensive.
20 That's all that we have at the present.

21 CHAIRMAN GETZ: Thank you. Mr. Katz.

22 MR. KATZ: As stated in our
23 intervention, our primary reason for being a part of this
24 docket is related to any briefing or action or evaluation
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1 that might occur relative to Section 253 of the
2 Telecommunications Act, and whether Commission rules or
3 state law is preempted. To the extent that any ruling on
4 that is going to be likely to affect our other docket or
5 ability to provide service in certain parts of the state,
6 we believe this issue is going to be very important to
7 determine.

8 One thing that I'd also add is that the
9 rulings and laws related to Section 253 in the first
10 circuit are very recent, and there have been a lot of
11 rulings, and this should be able to be decided relatively
12 quickly on briefs, in our opinion. And, additionally,
13 with regards to determining, you know, whether competitors
14 providing services should be, you know, stopped to -- from
15 providing service during some period, obviously, a state
16 action barring competitors from providing service would
17 inarguably be a barrier to entry under Section 253. And,
18 the First Circuit, in Puerto Rico Telecom versus
19 Municipality of Guayanilla back in 2006 has -- had
20 previously ruled that, once a barrier to entry is imposed,
21 it is actually -- the burden of proof is on the government
22 that is imposing that barrier in federal court to prove
23 that that imposition of a barrier falls within one of the
24 savings clauses of 253. And, I think that a drastic

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1 action such as that should really be only considered, you
2 know, in light of what the First Circuit has already said
3 about remedies such as that. Thank you.

4 CHAIRMAN GETZ: Thank you. Mr. Fossum.

5 MR. FOSSUM: I guess, at this point, I
6 have very little to add. You've certainly heard the
7 opinions of at least the parties and those who have
8 requested to intervene in the room, obviously, quite
9 obviously, have very different opinions about the
10 preemption issue and the underlying -- and possibly any
11 underlying factual considerations.

12 Briefly, though, as to the intervention
13 request of segTEL, we have not -- Staff has not reviewed
14 that intervention request. But, given the
15 characterization as it was described earlier, that segTEL
16 would be intervening for a determination on the legal
17 issue of preemption, Staff would certainly not oppose
18 that, and, as a matter of fact, probably welcome that, in
19 that it would essentially consolidate the core legal issue
20 into one docket. What happens after that legal issue is
21 determined I guess is of somewhat less concern. And, to
22 the extent that the dockets would need to be re-separated
23 after that, at this moment, I don't see why that would be
24 a problem.

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1 As to the question of process that has
2 been raised a couple of times, it appears that the parties
3 seem to believe that briefing is the most appropriate way
4 to handle this briefing on the legal issue of preemption
5 under federal law. And that, following that process,
6 there could be some resolution on the preemption issue in
7 a somewhat timely fashion, we would support then a
8 directive of some kind indicating that there would be
9 briefing on the preemption issue, in order to move this
10 case along and to resolve that issue, that core issue as
11 quickly as possible.

12 Staff, at this point, has no position on
13 the preemption issue, as in regard to this, nor on any one
14 of the numerous underlying factual issues that have been
15 raised by both Union and by Metrocast and IDT.

16 CHAIRMAN GETZ: Thank you. Okay.
17 Mr. Phillips, you have the last opportunity to speak at a
18 prehearing conference.

19 MR. PHILLIPS: Thank you. I just have a
20 couple of points. Just in response to Mr. Munnelly, you
21 know, I got this late as well. I had a chance to review
22 it. I think I have characterized it accurately, however,
23 when he goes through what his client believes constitutes
24 an "adverse impact" and a "barrier to entry", when I say
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1 that it is not only the state statutory requirements that
2 he's complaining about, but also the federal requirements
3 under 251(f) for reviewing and terminating a rural
4 exemption. And, that's coupled with this notion that a
5 CLEC has to have some kind of guarantee or assurance that
6 they will be able to serve in a rural territory, and more
7 so that they will actually have an assurance that they
8 will be able to have what he calls "marketplace success or
9 that the operations ever would earn a profit." And, so,
10 it seems to me that he is arguing that any requirements
11 whatsoever, any scrutiny, any process that the Commission
12 might use when reviewing an application is a barrier to
13 entry. He references the Wisconsin PUC case, in which
14 they found that a hearing requirement was a violation of
15 253-a, and the Wisconsin case actually references a
16 Pennsylvania Commonwealth court case.

17 CHAIRMAN GETZ: Well, let me -- let's
18 address this this way. Without having seen the document,
19 and whether it's actually a proposed --

20 MR. PHILLIPS: Right.

21 CHAIRMAN GETZ: -- findings, set of
22 findings of fact that we would make or is what I was
23 taking Mr. Munnelly to say, it's really a proposed set of
24 stipulated facts that the parties might address in a

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1 prehearing conference or a technical session. I'd let the
2 parties address that. If it is a proposed ruling that we
3 make, then you'll have an opportunity to respond in
4 writing, as you initially requested.

5 MR. PHILLIPS: And, that's fair. That's
6 fair. I mean, I guess my conclusion is that I don't
7 believe the Commission should simply abrogate any scrutiny
8 that they might have over these applications.

9 And, that -- and, on the issue of
10 disgorgement, I think the issue there, the difference
11 there is that I'm not asking IDT and Metrocast to make an
12 accounting of how much revenue they have derived from
13 their ported numbers and to, you know, to have that
14 reviewed, and then to have that money turned over to us,
15 that's not what I'm looking for. I'm looking for a way to
16 assure that, if Union Telephone prevails in this case,
17 they will be made whole for the harm that was done to them
18 during the time when the Applicant was offering service
19 without authorization. So, I think there is a legal
20 distinction there, and I would believe there would be a
21 financial distinction there as well. But, again, I'm not
22 looking for a disgorgement of revenues. I'm simply
23 looking for a mechanism by which, if Union prevails, they
24 can be made whole. On Mr. Coolbroth's point, --

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1 CMSR. BELOW: Hold on. I'm just sort of
2 curious. And, maybe this can ultimately be addressed
3 later, but just in trying to understand your preliminary
4 position here. If the conclusion was that we're not
5 preempted or state law is not preempted, that a hearing is
6 consequently required, but the result of that hearing were
7 to be that they were still authorized to do business as a
8 CLEC, then how would you unravel the question of when that
9 might have occurred if we had gotten it right, the
10 procedural process right in the first instance? So, I
11 guess the question, you know, to think about is, what the
12 harm to Union would be, if ultimately the result were they
13 were still authorized, but it was after a hearing? And,
14 I'm not trying to prejudge anything, I'm just saying a
15 hypothetical. And, it sort of goes to your question of
16 putting up a bond, I guess, as a contingency for the
17 opposite. Is it possible that the outcome of the hearing
18 would be that they would be prohibited from doing business
19 in Union territory for whatever reason, that then,
20 obviously, there's more of an argument that the harm was
21 done and, you know, you can discern the period of time.
22 But I'm just sort of asking, how do you deal with the
23 question, a hypothetical, if they ultimately are allowed
24 to do business, and how do you turn back the clock?

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1 MR. PHILLIPS: And, that's a great
2 question, Commissioner Below. I think the way you deal
3 with that is through legal filings. I think that that
4 goes to the Chairman's question as to what the standard
5 should be. And, I know that the Commission has not, you
6 know, previously articulated a standard of likelihood of
7 success on the merits. But I think it gets to that
8 question. You know, what is the likelihood that Union
9 would prevail ultimately in the case as the basis for
10 setting that bonding requirement? And, I'm not prejudging
11 that either. I'm simply offering that as the standard by
12 which the Commission might entertain that question.

13 CMSR. BELOW: Thanks. That helps.

14 MR. PHILLIPS: On Mr. Coolbroth's point
15 about the scope of 374:22-g, it was not my intention to
16 suggest that 22-g goes beyond telephone utilities. I
17 think you were making the point, Commissioner Below, that
18 it's not restricted to rural markets, and it applies to,
19 you know, any company that is seeking to serve as a
20 telephone utility anywhere in New Hampshire. And, I would
21 agree with that characterization. I don't think it goes
22 beyond that scope.

23 And, finally, to Mr. Billek's point
24 about GNAPs. You know, I am raising an issue that came to
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1 our attention yesterday. We were previously aware of it
2 as having been the case, you know, some time ago, two
3 years ago, when the discovery response was presented. The
4 situation apparently has not changed in those two years.
5 Although, of course, GNAPS's status as a CLEC in New
6 Hampshire has changed substantially, in terms of the
7 orders that they're under right now, including an order to
8 compensate us for the traffic that they have terminated to
9 us. And, I am simply saying that, that when it comes to
10 those sorts of issues, we are very interested in learning
11 just how those relationships work relative to their impact
12 on us. And, I think that is a, you know, a question that
13 is squarely placed before the Commission in an application
14 to serve.

15 CHAIRMAN GETZ: Okay. Then, at this
16 point, we'll close the -- Mr. Munnelly.

17 MR. MUNNELLY: I'll be very brief. Just
18 on the last point that was made by counsel, in terms of --

19 CHAIRMAN GETZ: Well, of course, then
20 we're going to go down this path, and he's going to have
21 another opportunity to respond. But, if you're going to
22 be very brief, --

23 MR. MUNNELLY: It will be very brief.
24 The findings, and you'll get to look at the findings once,
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1 you know, apologize you don't have it in hand, the
2 stipulation just reads that "we're not assured of a
3 certification at the end of the day." It's not intended
4 to say that "there should be no review." What it just
5 means is that a CLEC may very well have to undergo fairly
6 substantial procedural costs, and, at the end of the day,
7 not get anything, and they will have to factor that into
8 their finding. That's all that point was intended to be.

9 CHAIRMAN GETZ: Mr. Phillips.

10 MR. PHILLIPS: And, that's all that I'm
11 saying. Is that there's no other applicant that comes
12 before this Commission with an expectation that they will
13 be assured of a successful outcome.

14 CHAIRMAN GETZ: All right. So, we have
15 the opinions of both counsels on that interpretation. So,
16 at this point, we'll close the prehearing conference, and
17 I guess await a recommendation from the parties as to an
18 appropriate -- or, a recommendation for a schedule and any
19 other issues that we should consider before approving
20 process for the conduct of this proceeding.

21 So, thank you, everyone. We'll close
22 the prehearing conference.

23 (Whereupon the prehearing conference

24 ended at 11:53 a.m.)

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